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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

MAY 21 1992

Federal Communications Commission  
Office of the Secretary

In the Matter of  
  
Reexamination of the Policy  
Statement on Comparative  
Broadcasting Hearings

) CC Docket No. 92-52  
)  
)  
)  
)  
) RM-7739  
) RM-7740  
) RM-7741

**COMMENTS OF HARRY M. PLOTKIN**

Respectfully submitted,

HARRY M. PLOTKIN

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May 21, 1992

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**Introduction**

These comments are filed by Harry M. Plotkin, a citizen of the United States and a resident of the District of Columbia. The Commission in this proceeding is reexamining on a broad scale the use of comparative criteria in choosing among multiple broadcast applicants. As the Notice states (§ 4):

The Commission has full authority under the Communications Act to review its regulations to consider whether they continue to serve the public interest. Indeed, it is obligated to do so. As the Supreme Court has noted:

If time and changing circumstances reveal that the "public interest" is not served by application of the [existing] Regulations, it must be assumed that the Commission will act in accordance with its statutory obligations [and change them]. NBC v. U.S., 319 U.S. 190, 225 (1943).

The Notice describes in detail the efforts it has made by rule making and Policy Statements to set forth criteria that can be used in deciding comparative cases -- how to pick one out of several qualified applicants to whom to award a license -- so

that he will utilize the license to serve the public interest, convenience and necessity. It states (§ 2):

The criteria used to select among mutually exclusive applicants for new broadcast facilities have not been comprehensively reviewed for nearly 27 years.

In fact, there has been consistent and conscientious review of the criteria since the beginning of broadcast regulation. The problem of how to deal with a multiplicity of applicants has been present ever since Congress decided to require a license to operate a broadcast station.<sup>1/</sup> From an early date the Commission utilized very broad criteria -- to determine the legal, technical and financial qualifications of the applicant.<sup>2/</sup> Specific criteria were developed on a case-by-case basis such as local residence, integration of ownership and management, diversity, etc. But a showing was required on the issue of basic qualifications. The comparative hearing encompassed basic qualifications as well as comparative qualifications. The effort was then made to codify those criteria in Policy Statements -- or Rules and Regulations -- and to eliminate "character as a comparative factor" and to treat "it

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<sup>1/</sup> The problem also exists in connection with other uses of the spectrum. In one area, for example, the problem is easily resolved -- use of amateur frequencies. All qualified applicants are given a license for that purpose. If there are questions concerning qualifications they are resolved by appropriate processes -- not by the use of a comparative hearing.

<sup>2/</sup> Other issues could also be included but this was often a standard issue.

only as a basic qualifications issue."<sup>3/</sup> Nonetheless, the matter of character as a basic qualification issue continued to be tried in the comparative hearing.

## II. Issues Presented For Comment

There are three basic issues as to which comments are requested. The first issue may be stated as follows:

- Whether and to what extent the 1965 Policy Statement has produced the public interest benefits intended by the Commission.

I do not think anything but a negative answer is reasonably possible. The very detailed exposition in the Notice and the expressed urgent need for a reexamination bespeaks the answer. For what are the public interest benefits the Commission hoped to achieve. I believe they are:

- (a) To pick an applicant who is qualified to discharge a duty to operate in the public interest. The process accomplishes that result -- as does the Commission's process in picking an applicant who is unopposed in his quest to serve the public interest.
- (b) To have a process that enables the Commission to pick the applicant in a reasonable time period so that the chosen applicant can begin to provide the desired service as soon as possible. The Commission's process in picking an unopposed applicant achieves this result

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<sup>3/</sup> See Footnote 3 of Notice of Proposed Rule Making.

in a more or less satisfactory time period. The comparative process is disastrously slow.<sup>4/</sup>

(c) Does the process result or even aid in picking among the contesting applicants the one best qualified to serve the public interest? The exasperation that lies beneath the question speaks louder than a simple yes or no.

(d) Are there great costs to the public in the process? There certainly are. There is a tremendous expenditure of time and money by the Commission and each of the contesting applicants. As a substantive matter the hearing all too often degenerates into a search for negatives -- a real name-calling contest. This is degrading not only in itself but has the secondary deleterious effect of tearing communities apart. It would not be difficult to come up with a multiplicity of incidents where a comparative hearing involved several competing applicants composed of highly qualified persons respected in their community, people who have worked together on many causes for the public good. However, when pitted against each other the

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<sup>4/</sup> The Commission has in the past adopted processes that were intended to alleviate this aspect of the process. In the 1940's it followed a procedure in some AM cases of designating competing applications for hearing but issuing an authorization to one of the applicants to commence service. This ran afoul of the Supreme Court in Ashbacker. At a later date it adopted a process of making an interim grant attempting to avoid Ashbacker by having all the applicants participate in the interim operation.

inevitable character assassination besmirches the attacker as well as the attackee and disrupts the very essence of living together as a community. Moreover, there is a distortion in the process of assembling applicants interested in creating a group of persons who have a community of interest and desire to serve the public interest; there is every incentive to create a synthetic group -- one which has the appearance of meeting the criteria.

Second, is it possible to develop comparative criteria that will solve the problem? I do not think so. Qualification in essence is a basic requirement. The elements thereof should be set forth clearly; this is done in statute, rules and regulations, policy statements, etc. Some of these elements can easily be enumerated: citizenship, age, multiple ownership, drug convictions, etc. The existence or non-existence of such elements must be ascertained in the case of every applicant. There is a process for that end-examination of an application, a hearing if necessary -- but a comparative hearing is no place for it.

Third, is there a process which can serve the public interest. Two possible solutions have come forth -- a straight lottery or an auction. I believe they can be combined into one process -- an "auction-lottery." The essential elements of an auction lottery can be stated as follows:

- (a) A pool is created of eligible applicants. To qualify to be in the pool an application must be tendered accompanied by the requisite filing fee. All such applications will be examined by the Commission to determine if they are complete and if so will be accepted for filing. The applicant is now in the pool.
- (b) If there is only one applicant, the Commission will examine it and determine whether it is eligible for a grant. If not it will be designated for hearing. If there is more than one applicant, the next step is to proceed to the auction-lottery. The Commission will announce that bids from the eligible applicants will be accepted. The solicitation will designate a date certain by which bids will be accepted and will set a top upset price beyond which bids will not be accepted. This upset price will be determined on a case-by-case basis and could be based upon an estimate of what it would cost a typical applicant to go through a comparative hearing. During the bidding season the applicants could amend their applications, merge applicants, etc. On the closing date the highest bidder would be declared the winner. If there were two or more highest bidders the winner would be determined by lot among such bidders. The Commission would then make a final determination of the winner's qualifications. If the determination were negative,

the bidding process would begin again among the remaining applicants.

- (c) The element of preferences for minorities, women, etc. could be accommodated by providing that in the event of a tie an applicant who claimed a preference would have its name in twice rather than once. If the preferred applicant prevailed, the Commission in its final assessment of the applicant would pass on its qualifications as an applicant and as a preferred applicant.<sup>5/</sup>
- (d) Appeals could be taken to the courts by the rejected winning applicant or by the losing applicants -- to lay bare any errors of law committed by the Commission. If a remand were necessary the Commission would repeat the process. See FCC v. Pottsville Broadcasting Co., 309 U.S. 134; Section 402(h) of the Communications Act.<sup>6/</sup>

There is no reason why the same procedure could not be applied to renewals of license. There has been a great deal of discussion as to just what is the true nature of a license

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<sup>5/</sup> The bidding process and the auction-lottery does not impose an economic burden on preferential applicants. The upset price would by definition be what each applicant (including the ones claiming preference) would have to spend in the comparative hearing. In the case of auction lottery only the winner would pay that price.

<sup>6/</sup> This procedure could be applied to all original applications in the broadcast field noncommercial educational applications as to others. On the other hand the present procedure of comparative hearings could be continued since there are comparatively few instances where comparative hearings are required.

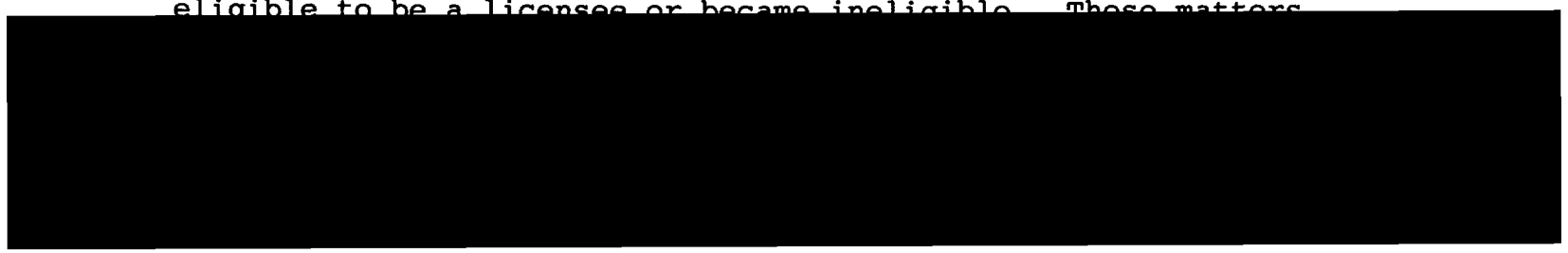


granted to an applicant. I believe it is in essence in the nature of a lease to use a frequency and the consideration is the promise to serve the public interest. It is initially for a fixed term, is transferable with the consent of the Commission (which cannot be unreasonably withheld) and is renewable -- a renewal expectancy exists. In order to obtain a renewal the licensee must file an application setting forth his eligibility to be a licensee and showing to the satisfaction of the Commission that it has utilized its facility to serve the public interest. If the Commission so finds, it issues a renewal, a new license for a fixed term. The process is at an end. If the Commission cannot make that finding it could so advise the licensee. At that stage the licensee could be given an opportunity to assign the license to an eligible applicant. If he chooses not to avail himself of the option given to him a temporary extension of authority to operate will be granted (not unlike an extension of the lease on a month-to-month basis) and the frequency would be open for applications as for an original grant. The auction lottery could then proceed.<sup>1/</sup>

The recommended procedure will not complicate transfers -- if anything it can simplify the process. As a substantive matter transfers should not be viewed as a necessary evil. Viewed realistically they are part of the process of selecting a

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<sup>1/</sup> There are obviously difficult questions that arise when the grant to the licensee was void ab initio as it were -- he was not eligible to be a licensee or became ineligible. These matters



licensee -- by definition a qualified applicant. In the case of an original application the Commission picks among volunteers -- if there is only one applicant, the Commission examines the application and determines whether the applicant meets the basic qualifications. If there is more than one applicant the Commission makes the choice by auction lottery. A transfer application presents the same choice to the Commission -- one applicant appears to request a license -- in effect an assignment of the lease. Viewed in this light it is possible to conceive of a process whereby an application is filed with appropriate filing fees and it will be considered granted by a date certain -- e.g., 30 or 45 days) unless the Commission on or before that date requests further information.

#### CONCLUSION

The proposals set forth herein, I believe, are in the public interest and within the Commission's authority to adopt. However, it should be recognized that the instant proceeding is but a step in a long process. If the Commission finds merit in the proposal and has some questions as to its authority to adopt some of the features, it can take the next step -- submit for comments questions of its authority either by further rule making or by making a report to Congress with a request for action by

it. The process can continue in an effort to achieve a desired result.

Respectfully submitted,

  
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